INDEX

Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	3
Statement	4
The Federal Question Was Appropriately Presented and Adversely Determined	6
Reasons for Granting the Writ	10
1. The Mississippi Court has decided a Federal question in conflict with the unanimous decisions from other appellate courts and in conflict with an applicable decision of this Court	10
2. The Mississippi Court has erroneously interpreted Mercoid Corporation v. Mid-Continent Investment Company, 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376	14
3. The question here involved is of great importance. The Mississippi Court has decided a Federal question which should be directly adjudicated by this Court	18
Conclusion	19
Certificate	20
Appendix A—Opinion of the Supreme Court of Mississippi	A1

TABLE OF CASES

Ake v. *Chancey*, C.C.A. 5, 149 F.2d 310	10
American Mills Company v. *American Surety Company*, 260 U.S. 360, 43 S. Ct. 149, 67 L. Ed. 306	11, 19
Audi Vision, Inc., v. *R. C. A. Manufacturing Company*, C.C.A. 2, 136 F.2d 621, 147 A.L.R. 574	11

Biaett v. *Phoenix Title & Trust Company*, 70 Ariz. 164, 217 P.2d 923, 22 A.L.R. 2d 615 11

Black v. *London Assurance Company*, D.C. S.C., 122 F. Supp. 330 16

Brinkmann v. *Common School District No. 27 of Gasconade County et al.*, Mo., 238 S.W.2d 1, affirmed 255 S.W.2d 779 12

Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329, rehearing denied 309 U.S. 695, 60 S. Ct. 581, 84 L. Ed. 1035 18

Cold Metal Process Company v. *United Engineering & Foundry Company*, C.C.A. 3, 190 F.2d 217 11

Commerce Manufacturing Company v. *Blue Jeans Corporation*, D.C. N.C., 146 F. Supp. 15 16

Cumberland Glass Manufacturing Company v. *Dewitt*, 237 U.S. 447, 59 L. Ed. 1042 13

Deposit Bank v. *Frankfort*, 191 U.S. 499, 24 S. Ct. 154, 48 L. Ed. 276 12

Douglas v. *Wisconsin Alumni Research Foundation*, D.C. Ill., 81 F. Supp. 167 16

Dupasseur v. *Rochereau*, 21 Wall. (U.S.) 130, 22 L. Ed. 588 12

Flickinger v. *Swedlow Engineering Co.*, Calif., 289 P.2d 214 12

General Casualty Company of America v. *Fedoff*, D.C. N.Y., 11 F.R.D. 177 16

Hancock Oil Company v. *Universal Oil Products Company*, C.C.A. 9, 115 F.2d 45 11

In re Hoelscher's Estate, Iowa, 87 N.W.2d 446 12

Jocie Motor Lines v. *Johnson*, 231 N.C. 367, 57 S.E.2d 388 11

Kauffman v. *Kebert*, D.C. Po, 16 F.R.D. 225 16

Lacy v. *Carson Manor Hotel*, Tex., 297 S.W.2d 367 12

Lesnick v. *Public Industrial Corporation*, C.C.A. 2, 144 F.2d 968 10-11

Louisville & N. R. Co. v. *Melton*, 218 U.S. 34, 54 L. Ed. 921 17

Meacham v. *Haley*, Tenn., 270 S.W.2d 503 12
Mercoid Corporation v. *Mid-Continent Investment Company*, 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376 14, 19
Moore v. *New York Cotton Exchange*, 270 U.S. 593 50 S. Ct. 367, 70 L. Ed. 750 11, 18, 19
Speed Products Company v. *Tinnerman Products*, C.C.A. 2, 222 F.2d 61 16
Stoll v. *Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 13
Switzer Bros., Inc., v. *Locklin*, C.C.A. 7, 207 F.2d 483, certiorari denied 347 U.S. 912, 74 S. Ct. 477, 98 L. Ed. 1069 15
Toncey v. *New York Life Insurance Company*, 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100 12
United Artists Corporation v. *Masterpiece Products*, C.C.A. 2, 221 F.2d 213 16
United States v. *Eastport Steamship Corporation*, C.C.A. 2, 255 F.2d 795 12, 17
United States v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894 18
Virgina-Carolina Chemical Co. v. *Kirven*, 215 U.S. 252, 30 S. Ct. 78, 54 L. Ed. 179 12

TEXTS AND STATUTES CITED

30A Am. Jur., Judgments, Section 386, Footnote 11 15
Annotation in 22 A.L.R.2d 621 *et seq.* 14, 19
New Title 28, United States Code, Section 2072 3, 10
Rule 13(a) of the Federal Rules of Civil Procedure 3, 10, 12, 14, 16, 18
Rule 13(b) of the Federal Rules of Civil Procedure 14, 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

THE PHOENIX INSURANCE COMPANY ET AL.,
Petitioners,

vs.

JAMES D. HANEY AND R. L. SWAN.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi in the above entitled cause.

Petitioners are The Phoenix Insurance Company, Citizens Insurance Company, Continental Insurance Company, New York Underwriters Insurance Company, North River Insurance Company and Scottish Union & National Insurance Company, as parties to the litigation, and Hartford Accident & Indemnity Company and Granite State Fire Insurance Company, as the Sureties on the Appeal Bond to the Supreme Court of the State of Mississippi.

OPINIONS BELOW.

No written opinion was rendered by the Circuit Court of Monroe County, Mississippi, and the adjudication of that Court is unreported.

The opinion of the Supreme Court of the State of Mississippi, on original hearing, has not yet been officially reported but appears as *The Phoenix Insurance Co. et al.* v. *James D. Haney and R. L. Swan*, 108 So.2d 227. A copy of that opinion is incorporated in the certified transcript of the record being filed herewith and a copy is attached to this Petition as Appendix "A".

No written opinion was rendered by the Supreme Court of the State of Mississippi on suggestion of error, but a copy of the Judgment overruling same is likewise incorporated in the certified transcript of the record.

JURISDICTION.

This case involves the right of the petitioners to an adjudication that a prior Federal Court judgment was *res judicata*, in view of Rule 13(a) of the Federal Rules of Civil Procedure, of the issues presented in the State Court. The Judgment of the Supreme Court of the State of Mississippi was entered on January 19, 1959, and the judgment on suggestion of error was entered on February 16. The mandate was stayed on March 24, 1959.

The jurisdiction of this Court is revoked under New Title 28, United States Code, Section 1257.

QUESTION PRESENTED.

The question presented is:

Where fire insurance companies institute in the Federal Court an action for a declaratory judgment of nonliability under certain policies of insurance and such action proceeds to final judgment without a counterclaim being filed by the insureds seeking to recover the policy proceeds, is not the Federal Court Judgment *res judicata* of the insureds' claim and are not the insureds thereafter precluded by Rule 13(a) of the Federal Rules of Civil Procedure from maintaining an independent action in the State Court for such proceeds?

STATUTES INVOLVED.

New Title 28, United States Code, Section 2072:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.
>
> * * *
>
> "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Rule 13(a) of the Federal Rules of Civil Procedure:

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the op-

posing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

STATEMENT.

As heretofore indicated, the federal question presented is the failure of the Mississippi Court to uphold the petitioners' plea that a prior Federal Court judgment was *res judicata* of the cause of action.

The litigation arose as a result of a fire which occurred on February 8, 1955, approximately 3½ miles west of Amory, in Monroe County, Mississippi. When the respondents, James D. Haney and R. L. Swan, purchased the fire and extended coverage insurance on January 10, 1955, the building was described as a "* * * restaurant with private dancing to members permitted * * *". Six policies of insurance were issued which provided an aggregate total amount of coverage of $6,000.00 on the building and $4,000.00 on its contents.

On October 4, 1955, the insurers filed as Civil Action No. 895 in the District Court of the United States for the Northern District of Mississippi, Eastern Division, a Bill for Declaratory Judgment seeking an adjudication of nonliability under the insurance policies now involved. The respondents were the defendants in that suit and although they filed an answer to the complaint, they filed no counterclaim to recover the policy proceeds. The Federal Court action proceeded to trial and to final judgment on April 6, 1956, without any counterclaim being propounded. The judgment of the District Court, from which no appeal was taken, was to this effect:

"THIS DAY this action came on for hearing before the Court without the intervention of a jury on the complaint filed by the plaintiffs herein, and on the answer filed by the defendants, and said parties being represented by counsel and having announced ready for trial, and the Court having heard the evidence adduced on behalf of the plaintiffs and the defendants, together with arguments of counsel, is of the opinion that the plaintiffs are entitled to a part of the relief prayed for.

"It is, therefore, ordered, adjudged and declared that there is no liability on the part of the plaintiffs to the defendants under the contents coverage of the policies of insurance involved in this action as a result of the fire loss of February 8, 1955.

"It is further ordered, adjudged and declared that all other relief prayed for herein be and the same is hereby denied."

The suits involved here were filed on September 10, 1956, in the Circuit Court of Monroe County, Mississippi. The insureds at first sued for only the $6,000.00 coverage on the building, but on March 13, 1957, they amended their pleadings to also sue for the $4,000.00 coverage on contents. A certified copy of the prior Federal Court proceeding was, by stipulation, placed in evidence.

The Circuit Court of Monroe County, Mississippi, and the Supreme Court of the State of Mississippi held that the Federal Court judgment was *res judicata* as to the contents coverage but not as to the building coverage; and accordingly, we submit, the petitioners were not afforded the immunity to which they were entitled by reason of the prior final judgment of the United States District Court.

THE FEDERAL QUESTION WAS APPROPRIATELY PRESENTED AND ADVERSELY DETERMINED.

When this litigation was commenced in the Circuit Court, each petitioner responded with a plea that the prior judgment of the District Court was *res judicata*, which plea averred:

> "That on October 4, 1955, the defendants filed a bill for declaratory judgment against James D. Haney and R. L. Swan in the District Court of the United States for the Northern District of Mississippi, Eastern Division, same being Civil Action No. 895 on the docket of said Court; that said Court acquired full and complete jurisdiction over the plaintiffs and the defendants and that the said R. L. Swan and James D. Haney filed their answer in said action in said Court; that said action made the liability of the insurance companies to the said James D. Haney and R. L. Swan under the insurance policies involved herein an issue, and the liability vel non of said insurance companies under the insurance policies involved in this action was an issue arising out of the transaction or occurrence that was the subject matter of the issues raised in said Civil Action No. 895 and at which time the claim, if any, of the said R. L. Swan and James D. Haney against said insurance companies was not the subject of any other pending action and did not require for its adjudication the presence of third parties of whom the Court could not acquire jurisdiction; that the said James D. Haney and R. L. Swan propounded no counterclaim against the plaintiff insurance companies in said Civil Action 895 as required by Rule 13(a) of the Federal Rules of Civil Procedure and that said Civil Action 895 proceeded to final judgment without any counterclaim having been filed by James D. Haney or R. L. Swan against said insurance companies and that the final judgment en-

tered in said Civil Action No. 895 on April 6, 1956, copy of which is attached hereto as Exhibit 'A' and by reference made a part hereof, is res adjudicata of any rights on the part of James D. Haney and R. L. Swan to recover any amount from said insurance companies under the policies sued on herein; that said Civil Action involved the identical parties, subject-matter and alleged cause of action presented in this Court, and said judgment entered by the Federal Court and from which no appeal was taken is not subject to collateral attack in this proceeding; that the said James D. Haney and R. L. Swan have waived any right to recover under the policies sued on herein by failing and refusing to propound a counterclaim against said insurance companies in Civil Action No. 895; that the said James D. Haney and R. L. Swan are estopped by the final judgment entered in Civil Action 895 to attempt to recover any amount from said insurance companies in these causes as consolidated."

During the trial in the Circuit Court and at the conclusion of the plaintiffs' (respondents') evidence, each petitioner presented a proper request for a directed verdict in its favor, and as one ground therefor submitted the following:

"The undisputed evidence discloses that the judgment heretofore rendered by the District Court of the United States for the Northern District of Mississippi, Eastern Division, in Civil Action No. 895 is res adjudicata of all issues here; that plaintiffs waived their right to assert any claim herein by failing to propound a counter-claim in said Federal Court suit as required by Rule 13a of the Federal rules of Civil procedure."

This request was renewed at the conclusion of the trial by an appropriate request for a peremptory instruction. In each instance the trial Court overruled the request of the insurance companies in so far as the building coverage was concerned.

The Federal question was presented to the Supreme Court of the State of Mississippi by an Assignment of Errors which averred error on the part of the trial Court by "* * * failing and refusing to grant appellants their requested peremptory instruction" and by "* * * entering judgment for the appellees and against the appellants in the principal sum of $6,000.00."

The issue was directly considered in the opinion of the appellate court and the following appears at 108 So.2d 227, *et seq.*:

> "The appellants contend that the judgment of the federal court was res judicata of the appellees' claim for the building; that the appellees' failure to file a counterclaim constituted a waiver of any rights which they may have had under the policies * * *
>
> "* * *
>
> "It is not necessary for this Court to decide whether the appellees could, and should, have filed a counterclaim and litigated all questions of liability under the policies before the federal court. The question is, did their failure so to do constitute a waiver of all their rights, and was the judgment of that court res judicata of such rights, especially when that court granted the insurance companies relief only as to the contents of the building, and denied all other relief, namely, their claim of nonliability for the loss of the building, and especially when there was no appeal by the companies from that judgment.
>
> "* * *
>
> "The appellees, by their failure to file a counterclaim and submit all questions as to their rights to recover under the policies, did not waive their rights to recover for the loss of the building, *nor was the judgment of the federal court res judicata against their right to recover for that loss.*" (Italics ours).

In the Suggestion of Error filed in the Mississippi Appellate Court, the Federal question was urged as the sole ground for a reversal of the Court's original judgment, and there the petitioners said:

"* * * our argument on suggestion of error will be limited to our principal position that the prior judgment of the Federal Court is res adjudicata of the issues here.

"* * *

"The opinion rendered by this Court recognizes that the declaratory judgment action in the Federal Court involved directly the question of whether appellants were liable to appellees under the fire insurance policies involved here. The opinion recognizes that the parties to that action were identical and that the subject matter of the litigation was identical. In addition, the opinion recognizes that the Federal Court acquired jurisdiction over the parties and the subject matter.

"Under these circumstances, the Court cannot ignore Rule 13(a) of the Federal Rules of Civil Procedure * * *

"* * *

"The Federal Rules were promulgated by the Supreme Court of the United States pursuant to 28 U.S.C.A., § 2072. This Court, of course, affords full faith and credit to these rules. See, for instance, *Lyle Cashion Company* v. *McKendrick*, Miss., 87 So.2d 289.

"* * *

"* * * *here there is involved a special aspect of the doctrine of res judicata which is expressed in Rule 13(a) of the Federal Rules of Civil Procedure.* Yet this Court has, in effect, ignored the Federal Rule and, while applying the general law on res judicata, has failed to recognize the *special aspect* of that doctrine which is imposed by Rule 13(a)." (Italics ours).

Therefore, at each stage of this litigation, the petitioners claimed an immunity under a final judgment of the District Court and relied upon an immunity under Rule 13(a) of the Federal Rules of Civil Procedure and, accordingly, under New Title 23, United States Code, Section 2072.

REASONS FOR GRANTING THE WRIT.

This petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Mississippi is predicated upon the following grounds:

1.

The Mississippi Court has decided a Federal question in conflict with the unanimous decisions from other appellate courts and in conflict with an applicable decision of this Court.

The complaint filed by petitioners in the United States District Court concerned directly the question of whether they were liable to the respondents under the policies here, and in fact the prayer of the complaint was that the Court would "* * * declare that the plaintiffs are not indebted unto the defendants in any amount whatsoever * * * as a result of the fire loss of February 8, 1955 * * *". The parties to that action were identical to the parties here and the subject matter of the litigation was likewise identical. The District Court acquired jurisdiction and thereafter rendered a final judgment without the respondents propounding their claim against the companies.

Other courts, where the question has arisen, have uniformly held that such a judgment is *res judicata* of the compulsory counterclaim. *Ake* v. *Chancey*, C.C.A. 5, 149 F.2d 310; *Lesnick* v. *Public Industrial Corporation*,

C.C.A. 2, 144 F.2d 968; *Hancock Oil Company* v. *Universal Oil Products Company*, C.C.A. 9, 115 F.2d 45; *Cold Metal Process Company* v. *United Engineering & Foundry Company*, C.C.A. 3, 190 F.2d 217; *Audi Vision, Inc.*, v. *R. C. A. Manufacturing Company*, C.C.A. 2, 136 F.2d 621, 147 A.L.R. 574; *Jocie Motor Lines* v. *Johnson*, 231 N.C. 367, 57 S.E.2d 388; *Biaett* v. *Phoenix Title & Trust Company*, 70 Ariz. 164, 217 P.2d 923, 22 A.L.R. 2d 615.

In *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 56 S. Ct. 367, 70 L. Ed. 750, this Court said:

"2. Equity Rule 30 in part provides:

"'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit and may, without cross bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross claims.'

"Two classes of counterclaims thus are provided for: (a) One 'arising out of the transaction which is the subject-matter of the suit,' which must be pleaded, and (b) another 'which might be the subject of an independent suit in equity,' and which may be brought forward at the option of the defendant. We are of opinion that this counterclaim comes within the first branch of the rule."

See also *American Mills Company* v. *American Surety Company*, 260 U.S. 360, 43 S. Ct. 149, 67 L. Ed. 306.

The Mississippi Court, however, in holding that the Federal judgment was *res judicata* only as to the contents coverage, limited the effect of that judgment to the issues

actually determined in the prior action. Yet other jurisdictions have recognized that Rule 13(a) adds a special aspect to the doctrine of *res judicata*. *United States* v. *Eastport Steamship Corporation*, C.C.A. 2, 255 F.2d 795; *Brinkmann* v. *Common School District No. 27 of Gasconade County et al.*, Mo., 238 S.W.2d 1, affirmed 255 S.W.2d 779; *In re Hoelscher's Estate*, Iowa, 87 N.W.2d 446; *Meacham* v. *Haley*, Tenn., 270 S.W.2d 503; *Flickinger* v. *Swedlow Engineering Co.*, Calif., 289 P.2d 214; *Lacy* v. *Carson Manor Hotel*, Tex., 297 S.W.2d 367.

In refusing to enforce Rule 13(a) as it is written, the Mississippi Court has actually failed to give effect to the final judgment rendered by the United States District Court. Under such circumstances the issue is a proper one to be reviewed by this Court. *Deposit Bank* v. *Frankfort*, 191 U.S. 499; 24 S. Ct. 154, 48 L. Ed. 276; *Virginia-Carolina Chemical Company* v. *Kirven*, 215 U.S. 252, 30 S. Ct. 78, 54 L. Ed. 179; *Toncey* v. *New York Life Insurance Company*, 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100.

In *Dupasseur* v. *Rochereau*, 21 Wall. (U.S.) 130, 22 L. Ed. 588, this Court said:

> "Where a State Court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the Act of 1867, may be brought to this court for revision. *The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up.* It would thus be a case arising under the laws of the United States, establishing the circuit court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court,

over cases arising in and decided by the State Courts." (Italics ours).

In *Stoll* v. *Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104, the Court said:

"Under it the judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is 'final until reversed in an appellate court or modified or set aside in the court of its rendition.' As this plea was based upon an adjudication under the reorganization provisions of the Bankruptcy Act, effect as res judicata is to be given the Federal order, if it is concluded it was an effective judgment in the court of its rendition. The problem before the Supreme Court of Illinois was not one of full faith and credit but of res judicata. In this particular case, a federal question was involved. This was the power of the Federal courts to protect those who come before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grants of power."

In *Cumberland Glass Manufacturing Company* v. *DeWitt*, 237 U.S. 447, 59 L. Ed. 1042, the Court said:

"The Federal question, which is the basis of jurisdiction here, arises upon the plea of res judicata to which a demurrer was sustained in the Maryland court of original jurisdiction, which judgment was affirmed by the court of appeals. This presents a Federal question because the plea of former judgment in a Federal court adjudicating a right of Federal origin asserts a right which, if denied, made the case reviewable here under § 709, Revised Statutes, § 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, §

1214). Deposit Bank v. Frankfort, 191 U.S. 499, 48 L. Ed. 276, 24 Sup. Ct. Rep. 154."

2.

The Mississippi Court has erroneously interpreted Mercoid Corporation v. Mid-Continent Investment Company, 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376.

The Mississippi Supreme Court, in its written opinion, relied upon *Mercoid Corporation v. Mid-Continent Investment Company, supra*, as authority for its decision. That case, which has been the subject of considerable criticism by other Federal courts, was simply an adjudication that, in a patent infringement suit, a claim for damages under the Clayton Anti-Trust Act was a "permissive" counterclaim under Rule 13(b) of the Federal Rules.

Rule 13(b) provides as follows:

> "Permissive Counterclaim. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

In the *Mercoid* opinion, this Court said:

> "The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment res judicata as respects it."

The foregoing should have no application to the present case which involves a compulsory counterclaim under Rule 13(a). This is illustrated by the *Annotation* in 22 A.L.R.2d 621, *et seq.*, which provides in part as follows:

> "II. Compulsory counterclaims.
>
> "§ 3. Generally.

"The failure to assert as a counterclaim a matter which should have been asserted under Federal Rule 13(a) or similar state rules or statutes precludes assertion thereof in a subsequent action. The following cases so hold or recognize (citing cases):

"• • •

"III. Permissive counterclaims.

"§ 9. Generally.

"The fact that a counterclaim, which could have been asserted in a prior suit under Federal Rule 13(b), is not so asserted, does not preclude assertion thereof in a subsequent action. Mercoid Corp. v. Mid-Continent Inves. Co., (1944) 320 U.S. 661, 88 L. Ed. 376, 64 S. Ct. 268, reh. den. 321 U.S. 802, 88 L. Ed. 1089, 64 S. Ct. 525, motion den. 323 U.S. 672, 89 L. Ed. 546, 65 S. Ct. 77; Big Cola Corp. v. World Bottling Co., (1943, C.A. 6th Tenn.) 134 F.2d 718; Douglas v. Wisconsin Alumni Research Foundation, (1948, D.C. Ill.) 81 F. Supp. 167."

The same interpretation of the *Mercoid* decision is found in 30A Am. Jur., *Judgments*, Section 386, Footnote 11.

Switzer Bros., Inc., v. *Locklin*, C.C.A. 7, 207 F.2d 483, certiorari denied 347 U.S. 912, 74 S. Ct. 477, 98 L. Ed. 1069, decided on October 8, 1953, demonstrates that this Court in the *Mercoid* case, held simply that the specific counterclaim involved there was a permissive one and thus controlled by Rule 13(b). While referring to the *Mercoid* case, the Seventh Circuit said:

"The counterclaim in the instant case is in precisely the same category as that which the Supreme Court was discussing. Accepting the statement of the Supreme Court at face value, as we must, it appears that Radiant's counterclaim was 'permissive' under

paragraph (b) * * *. Both the words 'compulsory' in paragraph (a) and 'permissive' in paragraph (b) are descriptive of the rights of the pleader. Neither has any bearing upon the right or duty of the court when a counterclaim is presented. This reasoning is consistent with and supported by the rationale of both the American Mills Company case, supra, and the Mercoid case, supra. See also Moore v. New York Cotton Exchange, 270 U.S. 593, 609, 46 S. Ct. 367, 70 L. Ed. 750, and Barber Asphalt Corp. v. La Fera Grecco Contracting Co., 3 Cir., 116 F.2d 211, 216. If the counterclaim is compulsory, it must be presented in connection with the main suit and, upon failure to do so, the claimant is barred from seeking the same relief in an independent action. *Failure to file the counterclaim is res adjudicata of the relief which might have been obtained thereby.* On the other hand, if the counterclaim is permissive, it is optional with the claimant whether he will plead it. Failure to do so does not render the judgment in the case res adjudicata. * * * In the one situation failure precludes an independent action, while in the other it does not." (Italics ours).

The very obvious distinction between the requirements of Rule 13(a) and Rule 13(b) was likewise recognized in *Speed Products Company* v. *Tinnerman Products*, C.C.A. 2, 222 F.2d 61; *Black* v. *London Assurance Company*, D.C. S. C., 122 F. Supp. 330; and *Commerce Manufacturing Company* v. *Blue Jeans Corporation*, D.C. N.C., 146 F. Supp. 15. See also, *United Artists Corporation* v. *Masterpiece Products*, C.C.A. 2, 221 F.2d 213; *General Casualty Company of America* v. *Fedoff*, D.C. N.Y., 11 F.R.D. 177; and *Kauffman* v. *Kebert*, D.C. Po, 16 F.R.D. 225.

In *Douglas* v. *Wisconsin Alumni Research Foundation*, D.C. Ill., 81 F. Supp. 167, in discussing the *Mercoid* case, the Court said:

"The statement contained in the Mercoid case that 'The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure, 28 U.S.C.A. does not mean that the failure to do so renders the prior judgment res judicata as respects it', appears almost too casually interjected; but its presence still results in the establishment of a rule of law. *Apparently, it was the intention of the Supreme Court to remove this particular type of counterclaim from the dictates of Rule 13(a) in the interest of public policy.*" (Italics ours).

And in *United States* v. *Eastport Steamship Corporation, supra,* decided on May 8, 1958, the Court said:

"In Mercoid the defendant pleaded as a counterclaim the alleged misuse of a patent by the plaintiff. In a previous suit against the defendant for infringement of the patent the defendant did not plead the misuse as a counterclaim. The Supreme Court held that the counterclaim was merely permissive and hence that the failure to assert it in the first action did not preclude its assertion in the later action. In view of the criticism which the decision has received and the failure of the Court to discuss the principles upon which the decision rests, *we think that Mercoid cannot be taken as precedent for other than its own limited facts.*" (Italics ours).

In view of all of the above, it is submitted that the *Mercoid* case is only authority where there is involved a "permissive" counterclaim under Rule 13(b), but that decision was otherwise interpreted by the Mississippi Court and such interpretation justifies a clear and decisive ruling from this Court as to the applicability, if any, of the *Mercoid* decision to the present question. *Louisville & N. R. Co.* v. *Melton*, 218 U.S. 34, 54 L. Ed. 921.

3.

The question here involved is of great importance. The Mississippi Court has decided a Federal question which should be directly adjudicated by this Court.

The importance of the doctrine of *res judicata*, especially as it is applied by State courts with regard to former Federal Court judgments, cannot be overemphasized. That doctrine, in its primary aspect, operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. In its secondary aspect *res judicata* has a limited application to a second suit between the same parties, though based on a different cause of action. The prior judgment there operates as an estoppel as to such issues as were actually determined in the first action. And this aspect of the doctrine of *res judicata*, commonly referred to as the doctrine of collateral estoppel or estoppel by judgment, is confined to issues actually litigated.

In promulgating Rule 13(a) of the Federal Rules of Civil Procedure, however, this Court created a *special aspect* of the doctrine of res judicata. The purpose of the rule was to avoid multiplicity of suits. *Moore* v. *New York Cotton Exchange, supra.* And, except when the application of the doctrine would be opposed to public policy*, this Court has applied the special aspect of the doctrine imposed by Rule 13(a).

The Mississippi Court has now applied the "public policy exception" to a case where no considerations of

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*Compare *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 60 S. Ct. 317 84 L. Ed. 329, rehearing denied 309 U.S. 695, 60 S. Ct. 581, 84 L. Ed. 1035, with *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894.

public policy are involved. The exception has become the rule.

Thus the specific question here involved should be settled by this Court. On the authority of *American Mills Company* v. *American Surety Company, supra,* and *Moore* v. *New York Cotton Exchange, supra,* lower Federal courts and State courts throughout the nation have adhered to the language of the rule. *Annotation,* 22 A.L.R.2d 621, *et seq.* The holding of *Mercoid Corporation* v. *Mid-Continent Investment Company, supra,* should be clarified for the benefit of not only the litigants here, but likewise for the judiciary throughout the country.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE.

The undersigned of counsel for petitioners hereby certifies that a true and correct copy of the foregoing petition for writ of certiorari has been served on Honorable W. S. Turner and on Honorable Jesse Coleman by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to said counsel at Aberdeen, Mississippi, in strict accordance with Rule 33 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954.

This 7th day of May, 1959.

THOMAS HENRY WATKINS,
Of Counsel for Petitioners.

APPENDIX

APPENDIX A.

No. 40,980

IN THE SUPREME COURT OF MISSISSIPPI

THE PHOENIX INSURANCE CO. ET AL.

VS.

JAMES D. HANEY AND R. L. SWAN

LEE, JUSTICE:

James D. Haney and R. L. Swan, in the Circuit Court of Monroe County, recovered a judgment for $6,000, and interest and costs, against the Phoenix Insurance Company and five other companies on account of a fire loss; and the companies appealed.

The litigation arose in this way: In the early part of October, 1954, Haney and Swan completed a building about 44 feet square several miles from Amory, which they operated, through a third party, as a cafe and drive-in, with seating accommodations for about 60 people. On January 10, 1955, they purchased fire insurance policies from the Phoenix Insurance Company and the other five companies for an aggregate sum of $6,000 on the building and $4,000 on the contents. The policies designated the location and recited that the property was "occupied as restaurant (private dancing to members permitted) * * *." About midnight of February 8, 1955, a fire occurred and both the building and the contents were a total loss.

The insurance companies through their attorneys, after due notice, on August 19, 1955, examined Haney and Swan under oath concerning the loss. They admitted that they

had never taken an inventory of the contents, and that they had no list thereof; that they kept a record of purchases in a ledger, but that it was in the building and was destroyed; and that they had no records to show how much they owed on the date of the fire. Although they admitted the operation of a vending machine, they denied that it was a gambling dveice. They denied that they knowingly permitted the sale of liquor at the place, but admitted that beer, the sale of which was illegal in the county, was sold at the place for two or three months. Haney was asked, "How did you get by with selling beer illegally there", and his reply was, "I refuse to answer that." He was also asked, "Did you make some arrangements that would permit you to sell beer there", and his reply was "I refuse to answer that." Swan said that, about a week before the fire, the constable of the district called on him for payment of protection, and that he refused to do so.

Thereafter on October 5, 1955, the insurance companies filed a suit against Haney and Swan in the Eastern Division of the District Court of the United States for the Northern District of Mississippi in which they sought to obtain a declaratory judgment that they were not indebted to the defendants in any sum whatever, either for the building or the contents, as a result of the fire loss of February 8, 1955. The complaint was based on (1) the alleged failure of the defendants to take a complete inventory and keep the requisite set of books and to keep the same in a fireproof safe at night or in some place not exposed to a fire which might destroy the building; (2) on the alleged increase of the hazard between a restaurant and a place where liquor was sold and gambling was carried on; and (3) on the refusal of the defendants to disclose the arrangements whereby they were able to sell beer illegally at the place. It was averred that the de-

fendants violated the terms of their policies in each of the named respects. They attached and offered in evidence copies of the statements of Haney and Swan under oath.

The defendants, in their answer, denied in detail each of the material allegations, and, as affirmative matters, set up that they would show on the hearing that the property was worth much more than $10,000; that it burned from an unknown cause; that they were not pressed by creditors; that the fire hazard was not increased by anything which was carried on at the place; and that they did not refuse any information, or wilfully refuse to answer any questions, or conceal any material facts.

The judgment of the Honorable Allen Cox, District Judge, of date of April 6, 1956, recited that the cause was heard by him, without the intervention of a jury, on the complaint, answer, and evidence for both parties, and that he was "of the opinion that the plaintiffs are entitled to a part of the relief prayed for.

"It is, therefore, ordered, adjudged and declared that there is no liability on the part of the plaintiffs to the defendants under the contents coverage of the policies of insurance involved in this action as a result of the fire loss of February 8, 1955.

"It is further ordered, adjudged and declared that all other relief prayed for herein be and the same is hereby denied."

Subsequently, the District Judge, by his order of date of June 21, 1956, after adjudging that no appeal from his judgment of April 6, 1956, had been taken by either of the parties to the litigation, granted the motion of the defendants to withdraw the original policies of insurance from the record.

Thereafter, on September 10, 1956, Haney and Swan filed separate suits against the Phoenix Insurance Company and the other five companies in the Circuit Court of Monroe County to recover the aggregate sum of $6,000 being the total amount of insurance on the building.

The defendant companies filed their separate answers, setting up the same defenses which they had tendered in their suit for a declaratory judgment, and, in addition, that the plaintiffs had set up no counterclaim in the federal court, and that the court's judgment of April 6, 1956, was *res judicata*, and that they had waived any rights which they might have had to a recovery.

The several causes, on motion of the defendants, were consolidated for trial as one cause.

On March 13, 1957, the plaintiffs amended their declaration so as to demand a recovery also for $4,000 additional, being the amount of the insurance on the contents; and the defendants amended their answers so as to deny liability therefor on the same theories as they had interposed against the original declarations.

Succinctly stated, the evidence showed that the plaintiffs failed to take a complete inventory and to keep the requisite set of books and to keep the same in a fireproof safe or in some place not exposed to a fire which might destroy the building. The judgment of the federal court had declared that the insurance companies were not liable for the loss of the contents. The sale of beer in Monroe County was illegal, and the plaintiffs knew and admitted that for two or three months before the fire it was being sold at the place; but they refused to disclose the nature of the arrangement under which they did so. While they permitted the operation of a machine with berries on it, which was stamped "For Amusement Only", and which

was also referred to as a pin ball machine, they denied that they permitted the operation of a slot machine, that is, the well-known gambling device commonly called "a one-arm bandit". The evidence was vague as to whether the machine in question actually constituted a gambling device. It was further shown that the cost of the building was in excess of the amount of insurance thereon.

At the close of the evidence, the court, at the request of the defendants, properly gave to the jury an instruction which required a verdict for them insofar as the contents of the building were concerned. The federal court had already so adjudged. There was no appeal from the judgment in the federal court, and there is no cross-appeal here from the judgment in the state court, and, of course, that question is entirely out of the case.

The court refused to give a peremptory for the defendants as to the whole case, but submitted the issue of increase in the hazard of the building to the jury. This issue was resolved to the jury in favor of the plaintiffs, and the verdict was for them, for $6,000, being the face amount of the policies on the building.

The appellants contend that the judgment of the federal court was *res judicata* of the appellees' claim for the building; that the appellees' failure to file a counterclaim constituted a waiver of any rights which they may have had under the policies; that the use of the building increased the hazard; and that the information concealed during the examination under oath was material, and its concealment operated to void the policies.

Rule 13(a) of the Federal Rules of Civil Procedure provides as follows: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out

of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action." Vol. 1, page 774, Federal Practice and Procedure, Rules edition, by Barron and Holtzoff.

It is not necessary for this Court to decide whether the appellees could, and should, have filed a counterclaim and litigated all questions of liability under the policies before the federal court. The question is, did their failure so to do constitute a waiver of all their rights, and was the judgment of that court *res judicata* of such rights, especially when that court granted the insurance companies relief only as to the contents of the building, and denied all other relief, namely, their claim of nonliability for the loss of the building, and especially when there was no appeal by the companies from that judgment.

In *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661, 88 L. Ed. 376, the suit was brought by Mid-Continent against Mercoid for contributory infringement of a patent. Mercoid's answer was a denial; and it also filed a counterclaim for declaratory relief and treble damages. The District Court granted its prayer for an injunction, but denied its prayer for damages. The Circuit Court of Appeals affirmed the judgment in disallowing damages under the counterclaim. It appeared that there had been earlier litigation in which Mercoid was not made a party, but it provided the defense. Therefore it was contended that the doctrine of *res judicata* bound it as respected issues which were actually litigated, or might have been raised in that suit. The opinion of the Supreme Court, in

rejecting that contention, said: "Though Mercoid were barred in the present case from asserting any defense which might have been interposed in the earlier litigation, it would not follow that its counterclaim for damages would likewise be barred. That claim for damages is more than a defense; it is a separate statutory cause of action. The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *res judicata* as respects it."

Actually, what the federal court did, in the present case, was to hold that the insurance companies were not liable, under their policies, for the loss of the contents. This action evidently stemmed from the fact that the defendants therein had wholly failed to comply with the terms of the policies by which they were required to take a complete inventory and keep the requisite set of books and to keep the same either in a fireproof safe at night or in some place not exposed to a fire which might destroy the building. The court declined to hold that the policies on the building had been voided because of an increase in the hazard either from the sale of beer at the place, or the operation of the alleged gambling machine, or because of the refusal to disclose the arrangements whereby the defendants were able to sell beer illegally at the place. The judgment, after granting the declaratory judgment as to the contents, expressly adjudicated that "all other relief prayed for herein be, and the same is hereby denied." Logically it follows that, from the judgment, the learned trial judge was of the opinion that the companies were liable for the loss of the building. In such circumstances, it would be an anomalous situation indeed for this Court to hold that the judgment of the Federal court was *res judicata* against the right of the appellees to recover for the

building when that court had expressly denied the prayer of the appellants for relief in that regard. As heretofore stated, the companies did not appeal from that judgment.

But, if the judgment of the federal court was not *res judicata* against the appellants, it was not *res judicata* against the appellees because that court made no award either for or against them on account of the loss of the building. "The rule is general that a former judgment on the merits, between the same parties, in a court of competent jurisdiction, is conclusive and final as to any issue actually litigated and determined in the former action, however erroneous, and which issue is essential to the maintenance of a second action between them, though it be brought upon a different cause of action." *Fair* v. *Dickerson*, 164 Miss. 432, 144 So. 238; *Cotton* v. *Walker*, 164 Miss. 208, 144 So. 45; *Von Zondt* v. *Braxton*, 149 Miss. 461, 115 So. 557.

In *Alexander* v. *Woods*, 115 Miss. 164, 75 So. 772, the appellees had obtained, in the chancery court, a temporary injunction, and the defendants had answered and filed a written suggestion of damages which they would ask upon the dissolution of the injunction. The cause, on being set down for hearing, was dismissed at the request of the complainants therein, and no action was taken in that court with reference to the suggestion of damages. Later, the defendants in that case, being the appellants in this case, filed suit in the circuit court to recover on the injunction bond, but, at the conclusion of the evidence, the court gave a peremptory instruction for the appellees. One of the reasons advanced by the appellees for the affirmance of that judgment was "that the dismissal of the case without awarding any damages was *res adjudicata* on the question of damages." But the opinion of this Court rejected

that contention and said: "The chancellor did not pass upon the question of damages in that court; consequently it is not *res adjudicata*."

In *Bush* v. *City of Laurel*, (Miss.) 105 So.2d 562, the trial court sustained a plea of *res judicata* by the City because, in two prior suits, the appellants had not asserted their claim for damages, when they might have done so, thereby holding that they had therefore waived their claims, if any. The appellants, on their appeal to this Court, contended that the trial court was in error because their claim for damages was not asserted or presented in those suits, wherein the appellees contended that such claim might have been propounded and included. The opinion of the court said: "We think that the contention of the appellants is sound and must prevail. The claim of the appellants to an award of damages was not propounded or asserted in the pleadings or on the trial of either of the prior suits and such an award was not essential either to the granting of the injunction or the granting of the decree of confirmation, and the question of the rights of the appellants to damages was not embraced or involved in either of the prior suits." It is well settled both under the majority rule and under the prior decisions of this Court that the mere fact that a claim might have been propounded in a prior suit does not make it *res judicata* if in fact it was not embraced or involved in it." The documentation included 28 Am. Jur., Injunctions, Section 309, page 483; *Hubbard* v. *Flynt*, 58 Miss. 266; *Davis* v. *Davis*, 65 Miss. 498, 4 So. 554; *Hardy* v. *O'Pry*, 102 Miss. 197, 59 So. 73; *Commercial Credit Co., Inc.*, v. *Newman*, 189 Miss. 477, 198 So. 303; *Paine* v. *Wilemon*, 227 Miss. 185, 85 So.2d 790; *Van Zandt* v. *Van Zandt*, 227 Miss. 528, 86 So.2d 466.

The appellees, by their failure to file a counterclaim and submit all questions as to their rights to recover under the policies, did not waive their rights to recover for the loss of the building, nor was the judgment of the federal court *res judicata* against their right to recover for that loss.

The appellants contend that the refusal of Haney to disclose what arrangements existed for the selling of beer was the wilful concealment of a material matter. But, if the hazard was increased, it was from the illegal sale, not from perhaps a side agreement with some officer, if such it was. Consequently the refusal to disclose the arrangements, if any, for the sale of beer was an immaterial matter.

On the question of an increase in hazard as avoiding the policy, they call particular attention to *Western Assurance Co.* v. *McPike*, 62 Miss. 740. But in that case a family residence was insured. The home was virtually abandoned for more than thirty days, in violation of the terms of the policy, and was converted into a retail liquor saloon, by someone without authority, paying no rent and having no family. In the present case, the insured building was a public one—a restaurant, known to be such by the companies at the time they insured it. With the capacity of this building to serve as many as sixty people at one time, it is difficult to see how the hazard was increased by the sale of beer to some of the patrons. At any rate, this issue was submitted to the jury by two instructions which were given at the instance of the defendant. In the first, "moral hazard" was defined, and the jury was instructed that "any change in the insured property that increases the probability of such a destruction (by them or others) increases the moral hazard" and "if you believe from a preponderance of the evidence in this

case that at the time of the fire loss of February 8, 1955, the moral hazard involving the property covered by the policies was increased by any means within the control or knowledge of the plaintiffs, it would be your sworn duty to return your verdict for the defendants."

The other instructed the jury that "if you believe from a preponderance of the evidence in this case that the plaintiffs, when examined under oath on August 19, 1955, concealed from the defendants the circumstance surrounding the sale of beer on the insured premises, and if you further believe from a preponderance of the evidence that beer was so sold, and that such sale amounted to an increase in the hazard involving the property covered by the insurance policies, and that the sale was within the control or knowledge of the plaintiffs, then it is your sworn duty to find for the defendants."

The jury was fully warranted in finding that the plaintiffs had not increased the hazard by reason of the sale of beer or by any other means within their knowledge or control.

Since the polestar of this Court is the true administration of justice, manifestly the judgment of the trial court should be, and is, affirmed.

AFFIRMED.

McGEHEE, C. J., AND HALL, KYLE AND HOLMES, JJ., CONCUR.